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IN THE

Supreme Court of the United States

OCTOBER TERM, 1896.

No. 135.

WILLIAM H. MOSES ET AL., ADMINISTRATORS OF THE ESTATE OF WILLIAM B. MOSES, DECEASED, PLAINTIFFS IN ERROR.

vs.

THE UNITED STATES, DEFENDANTS IN ERROR.

Supplemental Brief in behalf of the Plaintiffs in Error, filed by leave of the Court in granting a rehearing.

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(For a statement of the case and assignment of errors reference is made to our original brief filed at the October Term, 1894.)

FIRST.

The United States are estopped from maintaining this suit by the inequitable representations and conduct of their agents, which misled the said William B. Moses to his prejudice.

Moses was one of the sureties for Howgate in an alleged bond to secure the proper performance of supposed official duties of Howgate as property and disbursing officer of the Signal Corps of the United States Army. (See bond, Record, p. 24). This writing bears date March, 1878. In December, 1880, Howgate resigned, and his resignation was accepted (Record, p. 50). During the period from the date

of the bond to the time of resignation, Howgate's accounts were regularly stated and passed at the Treasury Department. After his resignation a certificate was issued to Howgate by the proper officer of each Department of the Government, to which he had been liable for money or property certifying that he had properly accounted and was not indebted or liable to the Government for any money or property, and on the 26th of April, 1881, a certificate was issued by the Treasury Department in which it was stated that—

> *"It is hereby certified that the accounts and returns of H. W. Howgate, Lt. 20th Inf., late acting signal officer U. S. A., have been examined, found correct, and closed,"*

and on the following day he was paid the balance of salary due him at the time of his resignation (Record, pp. 45 to 47 inclusive). These settlements and certificates were required by the Army Regulations of an officer retiring from service (Record, p. 51).

These settlements and certificates of non-indebtedness being matters of public record, in which Moses was interested, he is presumed to have had knowledge of them at the time they were made.

U. S. *vs.* Pinson, 102 U. S. 553.
U. S. *vs.* Alexander, 110 U. S. 325.

Such knowledge on the part of a surety was presumed by this court in the case last cited.

These acts and certificates constituted a representation by the United States, through its agents authorized to make it, that Howgate had properly accounted for all money and property which had come to his hands or for which he had in any way been liable, and that the sureties' liability on the supposed bond was at an end. Moses had no notice to the contrary, either express or implied, until the institution of this suit against him on the 29th day of September, 1884

(Rec., p. 1), a period of *three years and five months.* At the time of this settlement Howgate was solvent and had property in Washington, where both he and Moses resided, worth a large amount of money. No change was made in the condition or record of Howgate's accounts in the Treasury Department until the 7th day of October, 1884, after the institution of this suit, when the accounts were restated without notice to Howgate or either of his sureties, in which the vouchers which were claimed to be fraudulent were disallowed and a balance struck against him of more than $133 000. (Rec., pp. 30 and 31.) It is not shown by what authority or direction the accounting officers assumed to open and restate the account, and the unavoidable inference is that they did it upon their own motion and without any direction from the Secretary of the Treasury. This they had no authority to do and their action is void.

Ex parte Randolph, 2 Brock C. C. R. 447.

In the meantime, on the 24th day of August, 1881, the Government instituted a suit at law in assumpsit on the common courts against Howgate alone in the Supreme Court of this District, and obtained an attachment on the same day, by virtue of which a levy was made upon all of his property in Washington. The sureties had no actual or presumptive notice of this suit. If they had had notice or knowledge of the pendency of it, there is nothing in the record of it to notify or suggest to them that the Government claimed that the suit was for matters covered by the bond sued on in this case, or that there was anything wrong or fraudulent about the accounts which had been settled and closed at the Treasury. On the contrary, that suit was for money alleged to have been "unlawfully drawn by him [Howgate] from the Treasury," a liability not covered by the bond. (See partial record of that suit given in evidence by the defendants in error, Record, pp. 68 to 71.)

By virtue of the attachments sued out at the commencement of that suit, and levied upon all of Howgate's property, the United States realized the sum of $28,038.84, for which Howgate is given credit in a restatement of his account, made in 1889 (Record, pp. 31 to 35, especially page 34, where the credits appear in three items). It was more than three years from the time the defendants in error sued Howgate alone and attached all his property on the 24th day of August, 1881 (see Record, p. 67), until the institution of the present suit on the bond on the 29th day of September, 1884, and in the meantime Moses had no notice or intimation of any character, from any source, that the Government claimed that there was any liability on the bond, or that the settlement Howgate had made with the Government was tainted with fraud, and that settlement remained during all that time unquestioned on the books and records of the Treasury Department. And when the account was restated in October, 1884, neither Howgate nor his sureties, or either of them, had any notice or knowledge thereof. The accounts having been stated and closed on the 26th of April, 1881 (Record, p. 47), if the Government afterwards claimed to discover fraud in the settlement which avoided it, and intended to hold Howgate's sureties responsible on that ground, good faith required that the sureties should have been so notified promptly upon the discovery of the fraud. Had this been done, the sureties might have protected themselves by obtaining security of their principal, or might have paid the penalty of the bond and then attached Howgate's property, as the Government did. And good faith also required that this notice should have been given before the Government attached Howgate's property, that the sureties might have had an even chance with defendants in error in the race of diligence to secure themselves out of Howgate's property. But instead of so notifying them, they were permitted to remain lulled into supposed security until after the defendants in error had exhausted Howgate's property, and more

than three years afterwards Moses was for the first time notified by the institution of the suit against him that the Government claimed that the settlement which it had permitted to remain unquestioned for more than three years was fraudulent, while its agents had notice of the alleged fraud before it instituted its suit against Howgate on the 24th day of August, 1881.

There is no controversy about the foregoing facts, and they constitute bad faith towards the sureties which estops the Government from maintaining any suit against them. This principle is illustrated and applied in the following cases:

U. S. *vs.* Alexander, 110 U. S. 325.
Harris *vs.* Brooks, 21 Pick. 197.
Carpenter *vs.* King, 9 Metc. (Mass.) 511.
Baker *vs.* Briggs, 8 Pick. 131.
Taylor *vs.* Lohman, 74 Ind. 418.
Thornburg *vs.* Madren, 33 Iowa, 380.
Chambers *vs.* Cochran, 18 Iowa, 159.
Gordon *vs.* McCarthy, 3 Wharton, 406.
Brooking *vs.* Farmer's Bank et al., 83 Ky. 431.
Aaron *vs.* Mendel, 78 Ky. 427.
1 Greenl. Ev., Sec. 207.

In the case in 110 U. S. it is said by the court:

> "It may fairly be presumed that sureties take indemnities from their principals. We cannot hold that after they have had notice of the discharge of the bond on which they were sureties, and when their relation to their principal may have entirely changed and their indemnity been surrendered, it is within the power of the Secretary of the Treasury, without notice to them, to revive the bond, and reimpose its obligations upon them."

In Carpenter *vs.* King it is said:

> "It is well settled by numerous authorities, that when a creditor, who knows that one debtor is a

> surety, gives him notice that a debt is paid by a principal, and such debtor, in consequence, changes his situation, as by surrendering a security or forbearing to obtain security when he might, or otherwise suffer loss by it, he is discharged. And although the debt has not been paid, and such notice was given by mistake, and without any fraudulent design, it is a mistake made at his own peril, and he shall rather bear the loss than throw it upon one who has been misled by it."

Harris *vs.* Brooks, 21 Pick. 197; Shaw, C. J., said:

> "A parol declaration of the holder to the surety, that he would exonerate him and look to the principal only, is a good defense, on the ground that it lulls the party into security and prevents him from obtaining his indemnity; and it would be a fraud on the part of the holder afterwards contrary to such assurance, to call upon such surety."

In that case the evidence was that the creditor said to the surety that he would look to the principal only for the payment of the debt. It appeared that at that time the surety might have obtained indemnity. There was no express evidence that the surety neglected to endeavor to obtain security because of this representation, but that inference is drawn by the court. Nor did the evidence show that principal was insolvent at the time of suit against the surety, as is shown in this case.

In the case of Baker *vs.* Briggs, 8 Pick. 131, the following charge to the jury was sustained by the Supreme Court of Massachusetts:

> "That if they believed the plaintiff told the defendant that the note in suit was paid, intending to be so understood, and that the defendant was clear of it . . . and that in consequence the defendant lost an opportunity to secure himself . . . the defendant would be discharged."

It is also said in the case (p. 131) that—

> "mere delay or negligence to call upon or compel the principal to pay, would not give the surety a defense, but acts done which would prejudice him, *or deprive him of the power of obtaining indemnity, would.*"

The surety told the creditor in the presence of the principal that he wanted his name off the notes. The principal said he would not give other security, and if creditor would not take his unindorsed note he would pay the debt. The creditor thereupon said he would take the principals' unindorsed note as he did not want the money, and would bring the note down and take a new note; that he did not have the indorsed note with him. This was never done and no further conversation took place between the parties. Principal was solvent at the time but afterwards became insolvent, and creditor sued the surety on the note. Upon these facts the court said:

> "Uncontradicted, as it was, did it disclose a defense to the note as to the surety? We think it did. The agreement of Lohman to reloan the money to Pattie, Smith & Co. (the principals) on their own note, or to take the money due and surrender the note on which Taylor was surety, was calculated, in the language of the authorities, to lull him into security, and prevent him from obtaining his security."
>
> Taylor *vs.* Lohman, 74 Ind. 418.

The action was brought seven years after the arrangement, and the court mentions as important that no notice was given the surety that the arrangement had not been consummated, and that he would be looked to for payment.

In Thornburg *vs.* Madren et al., 33 Iowa, 380, the court said:

> "Now, the findings of the jury show that [the defendant] Lindley called on the agent having the note, with the intention of giving him notice [in pursuance of statute] to collect the same by suit against

> the principal, if he found it necessary, and that he was informed by the agent that the note was paid, and that he need give himself no further trouble about it. Lindley relied upon this representation, and took no steps to secure himself against loss. The creditor, through his agent, admitted or represented that the debt for which the surety was bound had been paid. The surety acted upon it, and will suffer loss if the creditor shall be allowed to controvert the fact of payment. In such case he is estopped from so doing."

In Chambers *vs.* Cochran, 18 Iowa, while it was held that the surety was not discharged under the particular facts of that case, Dillon, J., in delivering the opinion of the court, after referring to authorities upon the subject states the rule thus:

> "If we search for and extract the principle upon which these cases rest, it is this: If the creditor admits to the surety that he is paid, this admission is conclusive, provided the surety *acts upon* it, and would be made to suffer by the creditor's controverting the truth of the admission. And such admission may be by acts or conduct as well as by words, implied as well as expressed."

In Gordon *vs.* M'Carty, 3 Whart. 406, the plaintiff in error was surety in a bond given in the Orphans' Court by Jacob and George Kohl to secure to the defendant in error a legacy under a will. Ten years prior to the institution of the suit the defendant in error, obligee in the bond, executed a release which was recorded in the Orphans' Court. At the trial the plaintiff in error gave this release in evidence and relied upon it as a discharge from liability. The defendant in error gave evidence impeaching the release as having been procured by the fraud of the principal obligors. The court below admitted the evidence against objection, and charged the jury that if the release was obtained by fraud it did not work a discharge of the surety, and there

was a recovery. The Supreme Court of Pennsylvania reversed the judgment, holding that while the evidence was admissible, the plaintiff in error was discharged because of the failure of the defendant in error to notify the surety of the fraud upon the discovery thereof. Upon that point the court said:

> "Now it seems that it appeared on the trial, that Jacob Kohl, in the course of the ten years, became insolvent, and still continued to be so, at the time of the trial. This circumstance, taken in connection with the neglect on the part of the plaintiff below, either to bring a suit, or to make known to the defendant below the fact of the release, as she now alleges, having been obtained of her by false and fraudulent representations, for the space of ten years after she discovered the fraud in this respect, would undoubtedly, upon equitable principles, at least, be sufficient to discharge the defendant, and make the release a good protection as to him. Because it is perfectly evident, that if the plaintiff below came to the knowledge of the fraud which she alleges, was practiced upon her, before Jacob Kohl became insolvent, and she immediately advised the defendant of it, the latter might have obtained an indemnity of Jacob Kohl against liability as his surety; or have paid the money to the plaintiff below, and reimbursed himself by suit against his principal; but after the insolvency of the principal, this was impracticable. Hence it would be unjust, and against all conscience, to make the defendant below liable, when, by the act of the plaintiff there, in giving the release, he had reason to believe he was discharged from his obligation; and in the next place, through her neglect to advise him otherwise, he lost all possible chance of securing himself against loss on account of his suretyship. It is perfectly manifest, that as long as the plaintiff below made no objection to the release, the defendant had no right to do it, but had every reason to conclude it was good, and formed a complete discharge of himself from all liability on the obligation, and therefore had no occasion to give himself any

> further concern about it. There does not appear to be any evidence tending to prove that he knew of any fraud or undue influence having been practiced by Jacob Kohl, in procuring the release. It merely appears that he got the release written, but was not present at the execution of it."

On a retrial of the case, the court submitted to the jury the question whether the surety did not have knowledge of the alleged fraud, and there was another verdict and judgment against the surety, which was also reversed upon the ground that there was not sufficient evidence tending to prove such knowledge to justify the submission of the question to the jury.

McCarty *vs.* Gordon, 4 Whart. 321.

In Brooking *vs.* Farmers' Bank, 83 Ky. 431, the case was thus:

The bank held the note of W. S. Brooking as principal and Thomas and Butler as sureties. The principal having died before maturity of note, A. M. Brooking as administrator of the estate of W. S. Brooking paid the note at maturity, September 1, 1874.

The estate of W. S. Brooking, the principal, having proved insolvent and its entire assets having been consumed by a preferred claim which was sometime in litigation, the plaintiff in this case as administrator of W. S. Brooking brought this suit August 22, 1879, to recover from the bank the amount he had paid in liquidation of the note, in pursuance of a statute of the State authorizing such an action where an overpayment had been made by an administrator. On objection by the bank that the sureties should be made parties, that it might have a judgment over against them in case the plaintiff recovered against it, the plaintiff was required to amend and make them parties, which he did. The bank denied the right of plaintiff to recover, but prayed for judgment against the

sureties in case of a recovery against it, and prayed that its answer should be considered a cross-petition for that purpose. The court below on an agreed statement of facts substantially as above recited held that the plaintiff was not entitled to recover, and this judgment was affirmed by the Court of Appeals, on the ground that sureties were discharged by being led to believe by the conduct of the plaintiff that the debt to the bank was paid. The Court of Appeals states its conclusions as follows:

> "It seems to us, therefore, that . . . the administrator ought not to recover of the Farmers' Bank unless, when this action was commenced, it could maintain its cross-petition against the sureties in the note. For, if they had been discharged, it resulted from the negligence and bad faith of the administrator, and in that case it would be extending the operation of the statute for his benefit farther than reason or analogy authorizes to permit him to recover of the bank.
>
> "The mere acceptance by the bank of payment of the note did not of itself have the effect to release the sureties, for that payment was made subject to the right of the administrator, under the statute, to recover it back in case of the insolvency of the estate; and if he had, in good faith and in a reasonable time, commenced the proceeding provided by the civil code for the settlement of insolvent estates, and made the Farmers' Bank a party thereto, he might have recovered the amount paid by his mistake; for the discharge thereafter of the sureties, if it had occurred, would have been the fault of the bank and not of the administrator; but, as has been said, the surety is a favorite of the law, and when any act has been done by the obligee that may injure him, the court is very glad to lay hold of it in his favor.
>
> "In this case the sureties were induced to regard the note as satisfied, and were thereby deprived of the opportunity of seeking indemnity, either from each other or from the estate of the deceased principal in the note, and it may be safely said, according to both reason and

> authority, that the sureties in a note would be discharged in any case where the obligee has for nearly five years kept them lulled with the assurance the debt has been paid; for, as said by this court in Aaron *vs.* Mendel, 78 Ky. 427, where the creditor has been guilty of bad faith toward a surety, the court will not stop to inquire whether he has been actually injured or not."

In Aaron *vs.* Mendel, 78 Ky., 427, the facts were as follows: The defendant, Julius Mendel, was the surety in the bond of the plaintiff's guardian. Two days after she became of age she executed a release to the guardian which the defendant pleaded in his discharge. The replication was that the release was obtained by fraud of the guardian. The defendant had judgment below, which was affirmed for the following reasons, stated in the opinion of the court:

> "But from the nature of the transaction Mrs. Aaron must have been aware, at the time she executed the writing, that it was unjust, and ought not to bind her. Soon after her marriage she and her husband took legal advice on the subject and were fully advised of their rights in the premises; yet they stood by apparently acquiescing in what she had done for four years after the release was executed, and for three years after her husband had attained his majority, and after they were fully advised of their rights, without any step to obtain relief, and without notice to the surety that they would not abide by what had been done.
>
> "During the greater part of this time Julius Mendel was aware that the release had been executed, but was not, as far as appears, aware of the means by which it had been procured, or that Mrs. Aaron or her husband was dissatisfied with it.
>
> "Knowing that a release had been given, and hearing no complaint of it, he had a right to assume that it was satisfactory, and that his liability as surety for the guardian was at an end. He was not bound to inquire into the terms of the settlement, or the

manner in which the release was obtained; but from his knowledge of its existence, and being in ignorance of the fraud and undue influence by means of which it was procured, there was nothing to put him on inquiry, and he not only had no reason to seek indemnity, but, on the facts known to him, he had no legal ground upon which to ask it. Thus matters stood at least three years, during all of which time Aaron and wife knew all the facts, as well as their legal rights growing out of them, but they failed to take any steps to avoid the release, or even to give notice to the surety that they intended to do so.

"The relation between a creditor and one known to him to be bound only as surety for another is one of trust and confidence, and demands the utmost good faith on the part of the creditor.

"Was the conduct of Aaron and wife such as good faith toward the surety demanded?

"As long as they failed to repudiate the settlement and release, the hands of the surety were tied. Their silence was equivalent to a declaration that they were satisfied, and the surety, knowing that the release had been executed, was lulled into supposed security. He neither knew the necessity for seeking indemnity nor had he the legal right to demand it. He had no right to pay the debt and assume himself the position of creditor. Until they should elect to avoid the settlement and release there was no debt to pay, and this they might never do; and, having kept him so long in a position in which he was authorized by their conduct to believe he was finally discharged, and in which he was deprived by them of all right to seek indemnity, they were guilty of such bad faith toward him as ought, in equity and good conscience, to prevent them from now recovering."

Citing the case of Kerby *vs.* Taylor, 6 Johns. Ch. 248, in support of its position, the court then proceeds as follows:

"That there was fraud in this case and none in that, can have no other effect than this: as long as the fraud was concealed the ward could take no step

to avoid the release on that ground, and, consequently, non-action on his part would do no wrong to the surety; but when the fraud becomes fully known, and the ward is fully advised as to his rights, the fraud can no longer present an obstacle to his proceeding to avoid the release, and the consequences should be precisely the same as if the release had been procured without fraud.

"It is no answer to the argument drawn from the great delay to take steps to avoid the release to say that the principal was insolvent, and no indemnity could have been procured by the surety if he had been immediately informed of the fraud and the election of the ward and her husband to avoid the release on that ground. It is impossible to say what might have been accomplished either by legal proceedings or by personal persuasion, and, moreover, when the creditor has been guilty of bad faith toward the surety, which might have injured him, the court will not stop to inquire whether he has actually been injured or not."

The facts of the present case bring it fully within the rule announced and applied in the cases above cited. The conduct of the officers and agents of the defendants in error was such, in the language of the court in the case in 8th Pick. as to "deprive him [the surety] of the power of obtaining indemnity." For more than three years after they had full knowledge of the alleged fraud in the settled account they permitted Moses to rest in absolute ignorance of it, while they were securing Howgate's property for the Government. They had knowledge of the alleged fraud before the institution of the suit of the United States against Howgate in attachment above referred to; for, while there is no intimation in the record of that case that the matters involved in that suit entered into the account that had been settled, it appears by the evidence in this case that they constitute the alleged fraud relied upon to avoid the settlement made and entered on the books of the Treasury April 26,

1881. (Record, pp. 68 to 101.) During all this time the hands of Moses were tied. Even if he had had notice of the alleged fraud in the settlement, he could not legally have demanded security from Howgate, or paid the bond and sued him, with the settlement still of record in the Treasury and no proceeding pending to impeach it, and no notice or intimation from the Government that any such proceeding was contemplated, or that the Government was dissatisfied with the settlement. Indeed the conduct of the Government officers towards Howgate and his sureties for the three years and more intervening between their discovery of the alleged fraud and the institution of the suit against Moses, constitute a declaration as plain as any language could be that they did not consider the sureties liable for the matters for which Howgate was sued, and they proposed to look to him and his property alone for indemnity. Their failure to promptly notify Moses of the supposed fraud, and follow such notice with a suit on the bond within a reasonable time is susceptible of no other construction than that at the time of the institution of the suit against Howgate, they supposed the sureties were not liable, and that the suit on the bond was an after-thought suggested by their failure to collect the whole claim from Howgate's property. But whatever the reason of the failure to notify Moses and put him in a position to make efforts to protect himself, the legal effect of such acts is to discharge Moses. The reasoning of this court in the case in 110 U. S., as also that of the courts in the cases in 3 Whart., and 78 and 83 Kentucky apply with great force to the facts of this case and seem to control it.

It may also be remarked that the question arises in this case in the same manner that it did in those. Moses pleaded, amongst other defenses, conditions performed (Record p. 3, 7th plea). The defendants in the court below fully proved this settlement which sustained that plea (Record, p. 36 to 63.) The plaintiffs replied by offering evidence

"Socialists good faith should characterize the conduct
[illegible] in their dealings with individuals, and there is
[illegible], in morals or law, that will exempt them from the
[illegible] of punishment."

[illegible] vs. Milk, et al., 11 Fed. Rep., 397.

[illegible] vs. Miller, 3 Hatch, 335.

[illegible] vs. [illegible] 3 Paine 545.

[illegible] vs. [illegible], 3 Pick., 224.

[illegible] Proprietors, 10 Mass., 155.

[illegible] vs. [illegible], 15 Mich., 468.

tending to show that the settlement was procured by the fraud of Howgate, but they gave no evidence tending to show that upon the discovery of that fraud by the Government officers Moses was notified thereof, and that the Government claimed that he was liable notwithstanding the settlement. And there is no evidence tending to show that Moses had any notice or knowledge that the Government claimed there was fraud in the settlement at any time. The pleadings do not allege any fraud in the settlement. It is not contended that Moses was in any way connected with or had any notice or knowledge of the supposed fraud practiced by Howgate in procuring the settlement. Amongst what are termed the fraudulent vouchers is a check of Howgate's on the Treasury payable to W. B. Moses or bearer, but the proof is that Howgate himself received the money on the check. There is no evidence tending to show that Moses received the money on the check or any part of it, or ever had any knowledge of the existence of the check. (Record, p. 105.)

The principle of equitable estoppel applies to the Government as well as to individuals.

Calhoun Co. *vs.* Am. Em. Co., 93 U. S. 124.
U. S. *vs.* Lee, 106 U. S. 196.
U. S. *vs.* Alexander, 110 U. S. 325.
U. S. *vs.* Behan, Id. 338.

In U. S. *vs.* Alexander the principle was applied to the United States under substantially the same facts disclosed in the present case.

It is not contended that mere negligence of Government officials has the effect of discharging sureties. Here we have positive acts and representations on behalf of the Government which had the effect not only of misleading the surety as to the intentions of the Government, but also of effectually putting and keeping him in a position for more than three years, where he could not legally have made any effort to obtain security from his principal.

This point was properly raised by the plaintiff in error at the trial by the requesting of proper instructions which were denied and exceptions taken (Record, pp. 108–9, instructions 10 and 11; p. 110 for exception.)

In the event of a new trial of this case the plaintiffs in error will be able to show that valuable collateral held by one of the sureties was surrendered to Howgate after his settlement with the Government and on the faith of it.

SECOND.

The evidence failed to show that the sureties were liable for the money alleged to have come to the hands of Howgate.

The defendants' pleas alleged that there was no office of "property and disbursing officer, Signal Service, U. S. A.," created by law, nor any duties prescribed for any such office or officer, and that such duties were undefined; and the replication of the Government admitted there was no such office or duties prescribed by law, but that the office and duties had been created and defined by a regulation or order of the War Department prior to the giving of the bond, and that it was the duty of Howgate, under such regulation, to receive and disburse the moneys in controversy in this suit. At the trial no evidence was given of any such order or regulation. Nor was any evidence given tending to prove the duties of such officer by custom or otherwise. The defendants in error claiming that in the absence of such proof that it could not be determined whether the money sued for was covered by the bond, asked a binding instruction in their favor; which was refused. They then asked an instruction to the effect that what the duties of the officer were, and whether they covered the disbursement of the money in question was a question of fact, and that unless the jury should find that the duties of the officer required him to receive and disburse the money claimed by the

Government, they should find for the defendant; which was also refused.

The evidence having failed to show that any duties had been prescribed for the office, either by law, or by regulation or order of the War Department, or by usage or custom, there is no standard by which the extent of the condition of the bond can be measured, and under that state of the evidence no recovery can be had. This position seems to be fully sustained by the cases of—

United States *vs.* Quigley, 5 Pet. 115.
United States *vs.* Jackson, 104 U. S. 41.
United States *vs.* Maurice, 2 Brock. 103.

In this connection reference is made to our original brief in this case (pp. 20 to 30), where the condition of the Record upon this point is given in detail. And in addition thereto the following is submitted:

1st. That there is no evidence in the case tending to prove what the duties of the officer was, and that for this reason the court should have taken the case from the jury.

2d. That if there was any evidence tending to support this issue it should have been submitted to the jury with the instruction asked by the defendants.

What evidence is there in the Record bearing directly or remotely on this point?

1. It is said the name of the office itself indicates the duties.

It may indicate that he was to have charge of some property and disburse some money. The character or quantity of property is not suggested, nor is the amount of money or the purpose for which it was to be disbursed, or the territory or department embraced in the officer's jurisdiction.

2. It is also said that the letter of the Secretary of War and indorsement thereon (Record, pp. 53–54) in respect to the request of the Chief Signal Officer for an advance of $50,000 to Howgate, and requiring a bond to be given by

him, is proof of the duties of the officer. But this throws no light upon the subject and does not tend to support the replication that his duties were defined by regulations made by the Chief Signal Officer.

How can it be said that this evidence (which is the only evidence in the Record upon this point) defines and fixes the duties of this officer? They are too vague, indefinite, and uncertain to form the subject matter of a contract. From this proof can it be said that the duties of this officer, in contemplation of the parties when this bond was given, covered the enormous sums of money that were entrusted to him in the two and a half years next ensuing?

But if the court was right in declining to take the case from the jury on account of the failure of proof as to the duties of the officer for the performance of which this bond was given, then it is most respectfully and confidently contended that this question should have been submitted to the jury, as requested by the defendants, to decide whether the moneys which the plaintiff seeks to recover in this case were moneys which went into Howgate's hands as property and disbursing officer, and which were in contemplation by the parties when the bond in this case was given.

If the duties of the office were fixed by law or by regulation of the War Department, or was fixed by contract, then it would be proper for the court to decide as matter of law whether the defalcation in question is covered by the terms and conditions of the bond. But in this case the duties of the office are to be ascertained, if they can be ascertained at all, by proof of usage or custom, or by inference from other facts proven in the case. Under such circumstances, it is the province of the jury, and not the court, to decide whether from all the facts and circumstances proven the parties, when they executed the bond, had in contemplation the duties in respect of which it is claimed the officer made default.

There are many facts and circumstances appearing in this case which lead to the inference that the duties per-

formed by Howgate during the time when the defalcations are said to have occurred were essentially different from those performed by him at and before the time he gave the bond sued on. Attention is called to some of them:

1. The penalty of the bond, $12,000, does not indicate that he is to be entrusted with the enormous sums which were several months thereafter placed in his hands.

2. The direction of the Secretary of War to the chief signal officer that requisitions for money for this officer should not be for more than $25,000 at a time and at reasonable intervals apart. (Record, p. 54.)

3. The duties of the office were apparently local, it appearing from the order of appointment that he was to be property and disbursing officer at the Washington office. (Record, p. 19.)

It is well known that there are signal offices in all the large cities in the country, and it may be presumed that each has a disbursing officer.

4. At the time of his appointment he had in his hands to be disbursed only about $11,000.

5. During the fiscal year 1878 he received for disbursement only $111,600, or a little upwards of $9,000 per month.

All these facts indicate that up until the time this bond was given, and for some time thereafter, Howgate was merely a local disbursing officer, handling comparatively small sums of money which came into his hands in small amounts as needed, and promptly disbursed from month to month.

But in the fiscal year 1879 he appears to have received..... $450,785
In 1880..... 499,899
And from July 1, 1880 to September 30, 1880... 120,179

Two-and-a-quarter years..... $1,070,863

Which appears to be the entire appropriation for the signal service in all its departments, including expenditures in all parts of the country.

In view of these facts it is apparent that the duties of this officer were very much enlarged after the bond in this case was given.

It is believed that each of the points urged in this supplemental brief is fatal to the Government's case as made in the trial court, and requires a reversal of the judgment below, and for that reason alone the other points made in our original brief are not repeated here, but they are referred to and relied upon.

W. F. MATTINGLY,
W. L. COLE,
Attorneys for Plaintiffs in Error.

166-3 11

166-5-71

Court, U. S.
NOV 3 1896
JAMES H. McKENNEY,
CLERK

Supreme Court of the United States.

OCTOBER TERM, 1896.

WILLIAM H. MOSES, HARRY C. MOSES, and Arthur C. Moses, administrators of William B. Moses, deceased, plaintiffs in error.

v.

THE UNITED STATES.

No. 135.

IN ERROR TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

BRIEF FOR THE UNITED STATES.

Supreme Court of the United States.

OCTOBER TERM, 1896.

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v.
THE UNITED STATES.
No. 135.

IN ERROR TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

BRIEF FOR THE UNITED STATES.

This case having been once argued and submitted, a re-argument was directed, especially on the question of the effect of the alleged settlements of accounts of Howgate with the several Departments of the Government, upon the liability of the sureties on his bond.

We will consider, briefly, the other questions presented and treated of in the briefs of counsel heretofore filed.

It is insisted in the brief on behalf of plaintiffs in error, filed October term, 1894, page 10, that—

> *The writing admitted in evidence is not the bond of W. B. Moses, never having been sealed by him. There is no evidence tending to show that it was sealed by him or his authority.*

The declaration in this case (Rec., 1) makes profert of the writing obligatory sued on. If the defendants wished to object to the writing obligatory on the ground that it had not been sealed by Moses and consequently was not his bond, they might have craved oyer of the writing and plead the variance between the writing and the count, if such variance was apparent.

If, however, Moses had executed his single bill and a seal had been afterwards attached to his signature without his knowledge or consent, and was recognized in the body of the instrument, there was but one possible mode of pleading by which advantage could be taken of this fact; that was by plea of *non est factum*, verified by oath. The right of action originated in the District of Columbia, where the cause of action was executed. The proceedings then must be governed by the rules of practice and pleading which prevail in that jurisdiction. By the Maryland act of 1785, chapter 80, section 3 (Compiled Statutes District of Columbia, p. 449), the plea of *non est factum*, verified by affidavit, is required to put in issue the genuineness of the bond or deed sued on.

No such plea appears in this record. It does appear (Rec., 24) that the plaintiff offered in evidence the bond sued on, with the evidence authenticating it; and (Rec., 26)—

> Thereupon the defendants, by their counsel, interposed and objected to said bond being given in evidence and to the same being read to the jury, upon the ground that the same was not proven to be the bond of the defendant Moses; that the evidence introduced by the plaintiff showed that the seals

> appearing upon said bond were not thereon at the time the same was signed by said Moses, and that the evidence failed to show that the seals were thereafter attached thereto by or with his knowledge or consent; and that the evidence offered was not sufficient to show that the said paper writing was signed or sealed by the said Moses as his bond.

The bond was declared on in the declaration, and profert of it was there made. Its proof by the defendant was dispensed with until its genuineness should be impeached by the defendant by his sworn plea of *non est factum*. Had such plea been filed, the burden would then have been imposed upon plaintiff of proving the bond.

That the seals were not on the bond when Moses signed it is wholly immaterial; it might have been as well sealed after as before signing.

It is certain that when he signed it he saw on the face of the bond (Rec., 24), in the body of it, the words "sealed with our seals." He saw that it was an instrument to be sealed. If he delivered it, as he did do, as the evidence of his liability for the conduct of Howgate, he will not be heard now to impeach its validity.

In *United States* v. *Hodson* (10 Wall., 409), on a distiller's bond, this court said:

> Everyone is presumed to know the law. Ignorance standing alone can never be the basis of a legal right. If a bond is liable to the objection taken in this case and the parties are dissatisfied, the objection should be made when the bond is presented for execution. * * * Where it is voluntarily entered into and the principal enjoys the benefits which

it is intended to secure, and a breach occurs, it is then too late to raise the question of its validity. The parties are estopped from availing themselves of such a defense.

See, too, *United States* v. *Linn et al.* (15 Pet., 316).

Again, it is urged that—

The alleged bond is void for uncertainty.

It is urged on page 20 of the brief for plaintiff in error that there is no law creating any such office as that of "property and disbursing officer, Signal Service, United States Army, mentioned in said bond, or defining the duties of any such office or officer, and the said bond is void."

The United States may take a bond in cases not previously provided for by some law. As an incident to sovereignty, the United States, being a body politic, may enter into contracts not prohibited by law and appropriate to the just exercise of its constitutional powers. (*United States* v. *Tingey*, 5 Pet., 115; *Jessup* v. *United States*, 106 U. S., 147.)

When a penal bond recites that it was executed under seal, the obligor is estopped in an action on the bond from denying that it was so executed; and if having signed his name to the instrument he placed it in the hands of the person interested in having it accepted, who attached the seal and delivered it to the obligee and the latter received it and acted upon it in good faith, supposing it to have been executed under seal, he will not be permitted to deny his liability thereon. (*The M. L. I. Co.* v. *Bender et al.*, 124 N. Y., 47.)

It is further objected (brief of plaintiffs in error, p. 30) that—

> *The court erred in admitting the Treasury transcript in evidence and refusing to strike out the said document at the close of the defendants' evidence and in instructing the jury that said document was prima facie evidence of the indebtedness of Howgate to the United States.*

These assignments of error are based on the grounds—

I.

That the certificates attached thereto are not in proper form; and that the contents of the transcript are not such as are made evidence by the statute.

Section 886, Revised Statutes, provides:

> When suit is brought in any case of delinquency of a revenue officer, or other person accountable for public money, a transcript from the books and proceedings of the Treasury Department, certified by the Register and authenticated under the seal of the Department * * * shall be admitted as evidence, and the court trying the cause shall be authorized to grant judgment and award execution accordingly, and all copies of bonds, contracts, or other papers connected with the settlement of any account between the United States and an individual when certified by the Register or by such Auditor, as the case may be, to be true copies of the originals on file and authenticated under the seal of the Department, may be annexed to such transcripts and shall have equal validity and be entitled to the same degree of credit which would be due to the original papers if produced and authenticated in court: *Provided*, That suit is brought upon a bond or other

> sealed instrument, and the defendant pleads *non est factum* or makes his motion to the court, verifying such plea or motion by his oath, the court may take the same into consideration, and, if it appears to be necessary for the attainment of justice, may require the production of the original bond, contract, or other paper specified in such affidavit.

The certificates of the Auditor and of the Secretary of the Treasury (Rec., 27) show that what follows thereon in the record "is a transcript from the books and proceedings of the Treasury Department, and that the papers annexed thereto are true copies of the originals on file and of the whole of the said originals."

And this is recognized by the bill of exceptions taken by the plaintiff in error here (Rec., 26) which recites:

> And thereupon the plaintiff, to further maintain the issues upon its part joined, offered in evidence a transcript from the books and proceedings of the Treasury Department, together with the certificate of E. W. Keightley, Third Auditor, etc.

The very question here presented was raised and decided by this court more than sixty years ago in the case of *Smith* v. *United States* (3 Pet., 291), and the certificate in that case, though not near so accurate a compliance with the statute as here, was yet held to be "a substantial compliance with the requisitions of the statute."

See, too, *United States* v. *Pinson* (102 U. S., 552), and *United States* v. *Bell* (111 U. S., 477).

II.

Because the accounting officers of the Treasury had no power at the date of the alleged settlement set forth in said transcript to make the same, they having previously stated and settled an account with Howgate and issued him a certificate of nonindebtedness.

It is true that H. W. Howgate, being about to tender his resignation as first lieutenant, Twentieth Infantry, United States Army, obtained from the several Departments of the Government certificates to the effect that nothing appeared to be due from him to the United States on his accounts with these several Departments; the certificate from the Treasury Department being (Rec., 37)—

> October 1, 1880. Third Auditor's Office. I certify that I have examined and adjusted the accounts of H. W. Howgate, lieutenant, Twentieth Infantry, A. S. O., for January to June, 1879, and find the same balanced.
>
> Signal account.
>
> Balanced.
>
> As appears from the statements and vouchers herewith transmitted for decision and certification.
>
> A. M. GANGEWER,
> *Acting Auditor.*
>
> SECOND COMPTROLLER'S OFFICE,
> *November 23, 1880.*
>
> I admit and certify the above balance.
>
> JAMES S. DELANO,
> *Acting Comptroller.*

And this certificate is relied on as a complete estoppel upon the United States from asserting against the sureties on Howgate's bond, and proving that by false vouchers and other fraudulent contrivances he was indebted to the Government on the very account which his bond was intended to protect, in a large sum of money, which was not embraced and consequently did not appear in the settlement of accounts to which the above certificate referred.

To be sure, if a settlement was had with the Government by one, from whom a bond with sureties was required, after such settlement was made, the sureties on such bond might, with justice and propriety, insist that their liability should not be enlarged by any after-discovered errors or frauds by which the amount ascertained in such settlement should be shown to have been less than was actually due. But how a settlement made subsequent to the execution of the bond and subsequent to the breach of its condition can be made the basis of a claim on their part for immunity, it is difficult to perceive.

These settlements in the Treasury are matters of departmental regulation, adopted for the convenient and safe dispatch of business. That they are not conclusive, that they raise no insurmountable barrier against impeachment for fraud or mistake, would seem to be the obvious result of reason, as it is the unquestionable conclusion of authority.

Counsel in their brief cite many cases which they insist support the view of the conclusiveness of such settlements. Among these is an opinion of Attorney-General Butler (2 Op., 625), but it would seem that

before concluding that opinion he is careful to state (p. 630)—

> And even after the account is finally closed, so far as the Auditor is concerned, there may be cases in which the Comptroller, or the head of the Department, may be authorized to interfere for the purpose of correcting errors or frauds which may have been discovered after the action of the Auditor. And still further, although the matter may have passed beyond the reach of the executive officers, the Government will yet be entitled to surcharge and falsify by an appeal to the appropriate remedies furnished by the judicial tribunals.

And in *Ex parte Randolph*, 2 Brock., 475, to which especial attention is invited in brief of plaintiff in error, Judge Marshall closes his discussion of the question whether the Auditor can, *of his own mere authority*, reopen a settlement which has been closed, saying:

> I suppose there can be no doubt that a bill in equity would lie to surcharge and falsify, as in case of a settled account between individuals; and, moreover, according to the doctrine of the Supreme Court (11 Wheat., 237, *Perkins* v. *Hart*), *even at law*, although a settled account would be prima facie evidence, yet it (the Government) could recover upon proving mistakes or omissions any sum of which it had been thus unjustly deprived.

Since the decision in *Smith* v. *United States* (5 Pet., 294) the course of decision in this court as to the form and effect of transcripts in the Treasury Department has been uniform in holding that such settlements are prima facie evidence, and not absolute and conclusive. (*United States* v. *Gaüssen*, 9 Wall., 212.)

In *Soulé* v. *United States* (100 U. S., 11) the assignments of error are almost identical with those in the present case. The court said:

> Treasury settlements of the kind are only prima facie evidence of the correctness of the balance certified. But it is as competent for the accounting officers to correct mistakes and to restate the balance as it is for a judge to change his decree during the term in which it was entered. Errors of computation against the United States are no more vested rights in favor of sureties than in favor of the principal. All such mistakes in cases like the present may be corrected by a restatement of the account.

See, too, *Bechtel* v. *United States*, 101 U. S., 599; *United States* v. *Pinson*, 102 U. S., 555; *United States* v. *Bell et al.*, 111 U. S., 478.

See, too, 1 Foster's Fed. Prac., sec. 268, where the whole subject is fully considered and the cases examined.

The liability of a surety, although it must be strictly construed, is not abrogated by mistakes made in the settlement of his principal's accounts by the proper officers. That a mistake is in ordinary transactions between individuals a good ground for relief is of course familiar law, and there is no reason why the accounts of public officers should be exempted from the operation of the same rule. In some cases, indeed, mistakes will be corrected in the accounts of public officers, which if occurring between individuals would be permitted to remain untouched. The obligation of a surety on the bond of an officer, subject to be called to account, is, that his principal shall render a just and true account; and an account can not be called just or true in which exist mistakes, either manifest or occult.

Murfree on Official Bonds, sec. 803, citing—

Supervisors, etc., v. *Birdsall*, 4 Wend., 453.
Supervisors, etc., v. *Jones*, 19 Wis., 51.

Although a fair and reasonable settlement of a doubtful matter between a financial officer and those officers who are required by law to examine an auditor's accounts will not be reopened at the instance of the successors of the latter, the same strictness is not applied as in the case of private persons, and a mistake will be rectified even in a case where the settlement would be conclusive if the question arose between private persons.

Throop on Public Officers, sec. 282, citing—

Supervisors v. *Birdsall*, 4 Wend., 453.
Boardman v. *Flagg*, 70 Mich., 372.
Britton v. *Fort Worth*, 78 Tex., 227.
Farmington v. *Stanley*, 60 Maine, 472.
Supervisors v. *Knipfer*, 37 Wis., 496.

An analysis of the records of the accounts between Lieutenant Howgate and the United States, and of their alleged *settlement*, so far as they appear in this record, will serve to dispel the notion that such "settlements" were of such character as to operate as an estoppel upon any of the parties thereto.

In 1880, December 7, Howgate tendered his resignation as an officer of the United States Army. (Rec., 50.)

Drum, Acting Chief Signal Officer, forwarded the resignation "recommending acceptance on the settlement of his accounts."

Sherman (General), "approved and recommended."

In 1880, December 18, resignation accepted by the President.

Paragraph 2394, U. S. Army Regulations, provides:

> An officer retiring from service shall, before final payment, produce certificates from the several accounting officers of nonindebtedness to the United States and make an affidavit upon the final voucher setting forth the correctness of its several items, the place of his residence, and that he is not indebted to the United States on any account whatever. (Rec., 51.)

It was in order then to the final payment of his salary as a lieutenant in the Army, that the production of these certificates of nonindebtedness to the United States were required of Howgate upon his resignation. It was not his resignation that was conditioned upon such certificates, but it was the receipt of his pay.

Howgate accordingly obtained and produced certificates from the Engineer, Quartermaster-General, Ordnance, Paymaster-General, and Commissary-General Departments of his nonindebtedness to the Government on these several accounts. He also produced the certificate, hereinbefore recited, from the Treasury Department.

It will be observed that the certificate of nonindebtedness from the Treasury Department of April 26, 1881 (Rec., 47), states:

> This certificate is granted to satisfy the Pay Department that the above-named officer is not indebted to the United States *on the books of this office* at the date hereof.

The certificate hereinbefore recited of December 23, 1880, was, that the account of H. W. Howgate for January to June, 1880, was found balanced "as appears

from the statement and vouchers herewith transmitted for decision and certification."

So, that at most, all that was certified to in 1880 and 1881, as to Howgate's accounts, was, that so far as the "books of this office" and the "statements and vouchers" show, there was no indebtedness.

In August, 1881, the United States sued Howgate in assumpsit, claiming from him $101,257.08, as appeared by a bill of particulars filed therewith. (Rec., 68.)

The items of this bill of particulars appear to be for moneys of the United States drawn from the Government depository by Howgate as disbursing officer of the Signal Service of the United States Army, and misapplied by him to his own personal uses. These checks run from November 11, 1878, to September 1, 1880.

On May 24, 1883, judgment was recovered by the United States against Howgate for the full amount of said claim. (Rec., 71.)

The present action was brought September 29, 1884, against William B. Moses, who was surety for said Howgate, and jointly bound with him on the bond (Rec., 24), which was conditioned that—

> If the said First Lieut. Henry W. Howgate, Twentieth Infantry, shall and doth at all times henceforth and during his holding and remaining in said office carefully discharge the duties thereof, and faithfully expend all public money and honestly account for the same, and for all public property which shall or may come into his hands on account of Signal Service, United States Army, without fraud or delay, then the above obligation to be void; otherwise to remain in full force and virtue.

On October 1, 1884, a statement of the accounts of Howgate, showing in detail vouchers and checks which were known or believed to be fraudulent, with the names of the witnesses, etc., was transmitted by the Secretary of War to the Secretary of the Treasury. (Rec., 78.)

It was proven beyond question that the items of the bill of particulars (Rec., 68) appeared in the accounts of Howgate as properly supported by valid vouchers. But it appeared upon the proof in this case that as to the first item of $4,000 it had been applied by Howgate to the purchase of stock of the Western Union Telegraph Company on his individual account. (Rec., 91.)

As to the item of $12,100, the voucher was a forgery of the name of the treasurer of the Western Union Telegraph Company. And so on throughout as to all the items of the bill of particulars.

Now, on the "books of the office" of the several Departments, and so far as statements and vouchers show, all these disbursements were regular and proper; and the certificates of the several accounting officers to that effect were true.

Can it be possible that under any civilized system of jurisprudence or judicial procedure such certificates can have the effect of debarring the Government from the recovery of an amount actually due from a defaulting official, the fact of whose default has been concealed by false and fraudulent statements and vouchers?

The introduction of the transcript from the books and proceedings of the Treasury Department was objected to by defendant (Rec., 31) on the ground—

That the said transcript shows upon the face

thereof that it was a statement of balances and not the entire account between the United States and the said Henry W. Howgate of moneys coming to his hands and disbursed by him under the bond in the declaration mentioned; that it appears upon the face of said transcript that it is a restatement of his account, made after he ceased to be property and disbursing officer, Signal Service, United States Army, and that there was and is no authority in law allowing such restatements of said account, and that the same is not evidence against these defendants, who are the personal representatives of the said William B. Moses.

And again the introduction of said transcript was objected to (Rec., 36,) on the ground—

That the statement of account in said transcript mentioned appears to have been made after said Henry W. Howgate ceased to be property and disbursing officer, Signal Service, United States Army; and that there is no authority in law for the making or stating of the account in said transcript mentioned, and that the same is not evidence against these defendants.

To these objections it may be replied that the certificate of the Auditor (Rec., 27) is that the transcript was not of a statement of balances, but was "a transcript from the books and proceedings of the Treasury Department;" and the plaintiffs in error have, in their bill of exceptions (Rec., 26), so recognized it. *Smith* v. *United States* (5 Pet., 301). But the transcript itself shows that it is not of a statement of balances but of items. (Rec., 28–30.)

Again, the transcript is not of a *re*-statement of Howgate's account. There does not appear by this record to

have been any previous statement of such accounts. There were in 1880 and 1881 certificates from the Treasury Department, that so far as the "books in the office" and the "statements and vouchers" disclose that Howgate's accounts were balanced, but no statement of his account appears to have been furnished. It would be immaterial if there had been. They would have disclosed then what they do disclose now—apparent rectitude, internal rottenness.

The items of the bill of particulars (Rec., 68) appear on their face to be as fair and as sound as any other items embraced in the accounts. But, as we see them now, under the touch of the Ithuriel spear, their real character appears.

The fact that this discovery was made and the present suit brought since Howgate's resignation and since the certificates from the several Departments of his non-indebtedness, can not affect the right of the Government to recover the amount which the recent discovery discloses to be due.

Again, the judgment recovered against Howgate by the United States was admissible in evidence against the sureties in the action on their bond, and, if not conclusive, was at least prima facie evidence of their liability. (*Drummond* v. *Prestman Exrs.*, 12 Wheat., 515; *Stovall* v. *Banks*, 10 Wall., 583; *Washington Ice Co.* v. *Webster*, 125 U. S., 445.)

HOLMES CONRAD,
Solicitor-General.

○

166-601

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1895.

No. ~~538~~. 234

THE UNITED STATES, APPELLANT,

vs.

CLARENCE R. GREATHOUSE.

APPEAL FROM THE COURT OF CLAIMS.

FILED MARCH 1, 1895.

(15806.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1895.

No. 538.

THE UNITED STATES, APPELLANT,

vs.

CLARENCE R. GREATHOUSE.

APPEAL FROM THE COURT OF CLAIMS.

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1 In the United States Court of Claims.

CLARENCE R. GREATHOUSE
v.
THE UNITED STATES. } 18383.

I.—*Petition filed April* 24, 1894.

The petition of Clarence R. Greathouse respectfully represents that he is a citizen of the United States and of the State of California, now temporarily resident in Seoul, Corea.

1. That he was consul-general of the United States at Kanagawa, Japan, from August 1, 1886, to March 31, 1889, inclusive.

2. That during said period he collected at the consulate-general of the United States at Kanagawa, Japan, from sundry persons, and erroneously credited to the Government of the United States, the sum of one thousand seven hundred and ninety-five dollars ($1,795), the said sum being fees for the certification of invoices of goods shipped to Canada and other foreign countries in transit through the United States, and which said sum was by law the personal and unofficial perquisite of this petitioner.

3. That during said period he collected at the consulate-general of the United States at Kanagawa, Japan, from sundry persons, and erroneously credited to the Government of the United States, the sum of
2 sixty-two dollars ($62), the said sum being fees for certificates of the value of Japanese currency attached to certain invoices mentioned in the preceding paragraph, and which said sum was by law the personal and unofficial perquisite of this petitioner.

4. Your petitioner further states that all of the fees mentioned in the two preceding paragraphs hereof were voluntarily paid to him by persons at whose request the services therefor were performed; that he credited said fees to the Government of the United States, relying on the good faith of said Government to restore whatever belonged to him on a final settlement of his official accounts, and that said Government has not returned to him, or to any person for his use, said fees or any part thereof, although he has requested said Government so to do.

5. Your petitioner further states that he has been continually absent from the United States and beyond seas since August 1, 1886.

6. Your petitioner further avers that he is the sole owner of the claims herein set forth; that no assignment or transfer thereof, or any interest therein, has been made, and that he is justly entitled to recover from the United States the amounts herein claimed, by reason of the premises, after allowing all just credits and offsets, according to the "Statement of account" hereto attached, which account is referred to as a part of this petition, and that he believes the facts set forth in this petition are true.

3 7. Your petitioner prays that the facts relating to his claims herein may be investigated by this honorable court, and that judgment be given in his favor against the United States for the sum of one

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3 7. Your petitioner prays that the facts relating to his claims herein may be investigated by this honorable court, and that judgment be given in his favor against the United States for the sum of one

thousand eight hundred and fifty-seven dollars ($1,857) as aforesaid, which sum he claims is justly due to him.

CLARENCE R. GREATHOUSE.

Sworn to and subscribed before me this seventeenth day of October, 1893.

[SEAL.] H. H. ALLEN,
United States Chargé d'affaire ad interim.

4 STATEMENT OF ACCOUNT.

The United States to Clarence R. Greathouse, Dr.

1. For amount of fees for certifying invoices of goods shipped from Kanagawa, Japan, in transit through the United States to Canada and other foreign countries from August 1, 1886, to March 31, 1889, inclusive...	$1,795.00
2. For amount of fees for certificate of the value of Japanese currency attached to certain of said invoices.....	62.00
Total	$1,857.00

5 II.—*Traverse. Filed November* 19, 1894.

And now comes the Attorney-General, on behalf of the United States, and answering the petition of the claimant herein, denies each and every allegation therein contained, and asks judgment that the petition be dismissed.

And as to so much of the said petition as avers that the said claimant has at all times borne true faith and allegiance to the Government of the United States, and has not in any way voluntarily aided, abetted, or given encouragement to rebellion against the said Government, the Attorney-General, in pursuance of the statute in such case provided, denies the said allegations, and asks judgment accordingly.

J. E. DODGE,
Assistant Attorney-General.

6 III.—*Findings of fact and conclusion of law. Filed November* 26, 1894.

FINDINGS OF FACT.

This case having been heard by the Court of Claims, the court upon the evidence finds the facts as follows:

I.

The claimant was duly appointed consul-general of the United States at Kanagawa, Japan, and served as such from August 1, 1886, to March 31, 1889. Since first date he has continuously resided in foreign countries and has not returned to the United States.

II.

During said period he collected at the consulate-general from sundry persons for the certification of invoices of goods shipped through the United States in transit to foreign countries the sum of seventeen hundred and ninety-five dollars ($1,795.00).

III.

During said period he collected at the said consulate-general from sundry persons for the certification of the value of Japanese currency attached to the invoices mentioned in Finding II, the sum of sixty-one dollars ($61).

IV.

The claimant accounted for and paid to the United States under the rules and regulations of the State and Treasury Departments the fees so collected by him, as follows:

January 27, 1887	$185.00
March 25, 1887	331.50
June 25, 1887	169.50
October 19, 1887	172.00
February 14, 1888	167.50
April 10, 1888	185.50
October 11, 1888	191.50
June 16, 1889	297.00
May 16, 1889	104.00
July 18, 1889	52.50
	$1,856.00

CONCLUSION OF LAW.

Upon the foregoing findings of fact, a majority of the court decides as a conclusion of law, on the authority of the Mosby Case (133 U. S., 273) and Stahl's Case (26 C. Cls., 193), that the claimant is entitled to recover the sum of eighteen hundred and fifty-six dollars ($1,856.00).

BY THE COURT.

The court filed no opinion in this case.

8 IV.—*Judgment of the court.*

CLARENCE R. GREATHOUSE
v.
THE UNITED STATES. } 18383.

At a Court of Claims held in the city of Washington, on the 26th day of November, 1894, judgment was ordered to be entered as follows:

The court, on due consideration of the premises, find for the claimant, and do order, adjudge, and decree that the said Clarence R. Greathouse do have and recover of and from the United States the sum of eighteen hundred and fifty-six dollars ($1,856).

BY THE COURT.

9 V.—*Motion of defendants for new trial and order overruling same.*

Come now the defendants and move the court for a new trial of the above-entitled cause, and for grounds of such motion show:

1. That there is manifest error of the court apparent upon the findings of fact and conclusion of law in allowing items the right to which accrued more than six years before suit brought.

2. That the court erred in admitting as evidence the certificate of the consul-general at Kanagawa, stating conclusions of law from evidence before him, to the effect that certain invoices made out by his predecessor were for goods shipped in transit through the United States.

3. That the court erred in treating said certificate as sufficient evidence upon which to find that the said goods were so shipped in transit.

Respectfully,

J. E. DODGE,
Assistant Attorney-General.

Filed November 28, 1894.

Order.

Overruled by the court.

WILLIAM A. RICHARDSON,
Chief Justice.

January 7, 1895.

10 VI.—*Application of defendants for and allowance of appeal.*

From the judgment rendered in the above-entitled cause on the 26th day of November, 1894, in favor of the claimant, the defendants, by their Attorney-General, on the 15th day of January, 1895, make application for and give notice of an appeal to the Supreme Court of the United States.

J. E. DODGE,
Asst. Attorney-General.

Filed January 15, 1895.

Allowed in open court on the 18th day of February, 1895.

WILLIAM A. RICHARDSON,
Chief Justice.

11 In the Court of Claims.

CLARENCE R. GREATHOUSE
vs.
THE UNITED STATES. } No. 18383.

I, John Randolph, assistant clerk of the Court of Claims, do hereby certify that the foregoing are true transcripts of the pleadings in the above-entitled cause, of the findings of fact by the court, and the conclusion of law thereon, of the judgment of the court, of the application for and allowance of an appeal to the Supreme Court of the United States.

In testimony whereof I have hereunto set my hand and affixed the seal of said court, at Washington, this 28th day of February, 1895.

[SEAL.]

JOHN RANDOLPH,
Asst. Clerk Court of Claims.

12 (Indorsed on cover:) Court of Claims. Case No. 15806. Term No., 538. The United States, appellant, vs. Clarence R. Greathouse. Filed March 1st, 1895.

166-601

Office Supreme Court, U. S.
FILED
MAR 25 1897
JAMES H. McKENNEY,
CLERK.

In the Supreme Court of the United States.

OCTOBER TERM, 1896.

THE UNITED STATES, APPELLANT,
v.
CLARENCE R. GREATHOUSE. } No. 234.

APPELLANT'S BRIEF.

JOSHUA ERIC DODGE,
Assistant Attorney-General.

In the Supreme Court of the United States.

OCTOBER TERM, 1896.

THE UNITED STATES, APPELLANT,
v.
CLARENCE R. GREATHOUSE. } No. 234.

APPELLANT'S BRIEF.

STATEMENT.

Claimant was consul-general of the United States at Kanagawa, Japan, from August 1, 1886, to March 31, 1889. During that period he charged, collected, and paid into the Treasury of the United States certain unofficial fees, which at that time were by the Treasury Department required aggregating $1,856. The petition was filed April 24, 1894. Of the amounts so paid in $1,211 were paid in on or before April 10, 1888, and $645 on and subsequent to October 11, 1888. (Finding IV, p. 3.) Claimant alleges in his petition that he had been continually absent from the United States and beyond seas subsequent to August 1, 1886. The find-

ings made by the court are entirely silent on that subject. The allegation also was wholly without evidence for or against it.

ASSIGNMENT OF ERRORS.

I. The court erred in not holding all sums paid by the claimant into the Treasury prior to April 24, 1888, as barred by the statute of limitations and without the jurisdiction of the court, and in including such sums or any part thereof in the jugdment rendered.

II. The court erred in rendering judgment in favor of the claimant for the sum of $1,856 or for any sum in excess of $645.

ARGUMENT.

The error alleged to have been committed by the Court of Claims consists in recognizing absence beyond seas as an exception to the six years' statute of limitations contained in § 1 of the act of March 3, 1887, known as the Tucker Act, chapter 359. The last paragraph of said § 1 reads as follows:

> *Provided*, That no suit against the Government of the United States shall be allowed under this act unless the same shall have been brought within six years after the right accrued for which the claim is made.

The statute of limitations upon the jurisdiction of the Court of Claims existing prior to 1887 was § 1069 of the Revised Statutes, which fixed the same period of limitation, and then provided that in case of disability from coverture, minority, or insanity, and in case of absence beyond seas at the time the claim accrued, then

the claim should not be barred if the petition be filed within three years after the removal of such disability.

The only possible question that can arise as to the generality of the application of the last paragraph of § 1 of the act of March 3, 1887 (Tucker Act), to all suits against the Government must be drawn from the expression contained therein prohibiting suits "under this act" unless brought within six years after the right of action accrued. But it does not seem to me that even that doubt can exist. Section 1 of the act of March 3, 1887, is a comprehensive section conferring all of the jurisdiction of a general character which the Court of Claims has. It is a revision or rewriting of the previous jurisdiction existing under the Revised Statutes, with some slight addition, as was decided by this court in *United States* v. *Jones*, 131 U. S., 1 (foot of p. 15 and p. 16), where the court say:

> Turning now to the act of March 3, 1887, which reenacted or revised the previous laws as to the jurisdiction of the Court of Claims, and conferred concurrent jurisdiction for limited amounts on the ordinary courts.
>
> * * * * *
>
> The jurisdiction here given to the Court of Claims is precisely the same as that given in the acts of 1855 and 1863, with the addition that it is extended to "damages in cases not sounding in tort" and to claims for which redress may be had "either in a court of law, equity, or admiralty."
>
> "Damages in cases not sounding in tort," that is to say, damages for breach of contract, had already been held to be recoverable against the Government under the former acts.

In other words, all jurisdiction over suits against the United States since its enactment has rested upon the act of March 3, 1887.

The limitation as to time when suits shall be brought is a part of the jurisdictional provision. It is a limit or qualification of the jurisdiction and not merely a defense against suits which the court might entertain. (*Kendall* v. *United States*, 107, 123, 125; *Finn* v. *United States*, 123 U. S., 227, 232.) It therefore seems plain that the Court of Claims has no jurisdiction to entertain a suit upon any cause of action which accrued more than six years prior to its commencement, and that all of those excuses and exceptions for disability or absence which were attached to the limitation section in the Revised Statutes, viz, § 1069, are now of no avail.

Any other construction would result in such absurdities as to render its adoption impossible. Thus, if the old § 1069 is still the measure of limitation upon suits over which jurisdiction was given by Revised Statutes and the laws there codified, and the last clause of § 1 of the act of 1887 is to apply only to the jurisdiction newly created by that act, we have the anomaly that most suits in the Court of Claims may be commenced any number of years after they accrue, provided disability or absence beyond the seas existed; but that the one new class of suits authorized by the act of 1887, namely, those for which redress could be only had either in a court of equity or admiralty, should be absolutely excluded if the cause of action accrued more than six years before its commencement.

Again, we should have the anomaly of a concurrent jurisdiction of circuit and district courts with the Court of Claims over cases within the $10,000 limit, but in the circuit and district courts should have that jurisdiction further confined to cases arising within six years; while in the Court of Claims it should not be so limited in cases at law if disability or absence excused the delay, a result clearly never contemplated by the Tucker Act, which, as this court has pointed out in the case of *United States* v. *Davis* (131 U. S., 36, 39), made the jurisdiction of the various courts concurrent and coterminous. We should have the same claimant with the same cause of action entitled to sue in the Court of Claims, but barred in a district or circuit court.

We should have the claimant, if seeking to recover damages in a case "not sounding in tort," but growing out of what would be a legal contract liability, permitted to sue in the Court of Claims more than six years after his cause of action accrued; while the same claimant, if his liability (although contractual and although damages not sounding in tort) had been cognizable only by a court of equity or admiralty, would be absolutely excluded if he did not sue within the six years. In other words, we should have a failure of concurrency in jurisdiction between the Court of Claims and the circuit and district courts, and we should have differing limitations upon the jurisdiction in the Court of Claims according as the case was one cognizable by courts of law or by courts of equity and admiralty if between individuals.

I submit that the general jurisdiction of the Court of Claims is limited to claims accruing within six years, and

that the present judgment should be reversed and the Court of Claims directed to dismiss the petition as to that part of the claim accruing prior to April 24, 1894, viz, $1,211.

JOSHUA ERIC DODGE,
Assistant Attorney-General.

166-601

IN THE

JAMES H. McKENNEY,
CLERK.

Supreme Court of the United States.

OCTOBER TERM, 1896.

THE UNITED STATES,
APPELLANT,
vs.
CLARENCE R. GREATHOUSE.

No. 234.

APPELLEE'S BRIEF.

JOHN C. FAY,
Attorney for Appellee.

WASHINGTON, D. C.:
GIBSON BROS., PRINTERS AND BOOKBINDERS.
1897.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1896.

THE UNITED STATES,
APPELLANT,
v.
CLARENCE R. GREATHOUSE.

No. 234.

APPELLEE'S BRIEF.

Statement.

This was a suit by the claimant, who was Consul-General of the United States at Kanagawa, Japan, from August 1, 1886, to March 31, 1889, to recover certain unofficial fees aggregating $1,856, which were turned over by him to the Treasury Department and which this court in the case of Mosby against United States (133 U. S., 273), held could be recovered back. The petition was filed April 24, 1894, and $1,211 of the amount claimed had been paid into the Treasury more than six years before the filing of the suit. The claimant was absent from the United States at the time the claim accrued and had not returned up to the time of the

filing of the suit, and so the court found in its first finding of fact, page 2 of the record. The appellant is in error in the statement that the findings of the court below failed to find this fact, as reference to the first finding will disclose (Record, Finding 1, p. 2).

ARGUMENT.

The errors assigned upon this appeal are predicated upon the theory that the last paragraph of the Act of March 3, 1887, known as the Tucker Act, repeals section 1069 of the Revised Statutes. Section 1069 is as follows:

"SEC. 1069. Every claim against the United States, cognizable by the Court of Claims, shall be forever barred unless the petition setting forth a statement thereof is filed in the court, or transmitted to it by the Secretary of the Senate or the Clerk of the House of Representatives as provided by law, within six years after the claim first accrues: *Provided*, That the claims of married women first accrued during marriage, of persons under the age of twenty-one years first accrued during minority, and of idiots, lunatics, insane persons, and persons beyond the seas at the time the claim accrued, entitled to the claim, shall not be barred if the petition be filed in the court or transmitted, as aforesaid, within three years after the disability has ceased; but no other disability than those enumerated shall prevent any claim from being barred, nor shall any of the said disabilities operate cumulatively."

If this section is in force, there is no error in the judgment. If the Tucker Act by implication repeals it, the bar of that statute may apply.

It will be observed that the language of the proviso in the Tucker Act relates solely to "suits allowed under this Act." It was not supposed to be in its purpose or intent a curtailment of jurisdiction, but an enlargement thereof.

The whole tenor of the Act indicates that it was the purpose of the Act to add to the already established jurisdiction of the court. Illustrations are found in many parts of the Act indicating this intention. In sections 8, 13, and 14, references to the existing jurisdiction are made. The Act was not a restriction of the jurisdiction of the court, but an enlargement of it.

In the case at bar no aid was needed from the Tucker Act to institute the present suit, nor was the suit instituted under the provisions of that Act. This suit was brought under the jurisdiction conferred by section 1059, R. S., and the exceptions reserved under section 1069, R. S. The appellee does not observe the force of the argument of the Attorney General that an absurdity would exist if the Statute of Limitations provided for under these two acts should be so construed that exceptions on account of disabilities, beyond the seas, infancy, etc., should apply to then existing causes of action, and a six-year limitation without exceptions should be applicable only to the enlarged jurisdiction granted under that Act.

Nothing is more common in legislation than to find one limitation of time as to one class of actions and another limitation as to another class. Nor is the argument that the jurisdiction conferred upon the Circuit Courts concurrent with the Court of Claims should have one limitation and the Court of Claims should have another at all convincing; for we find in this very Act that the time for appeal from judgments from the Circuit Courts is six months, while the time for appeal from judgments in the Court of Claims is ninety days; and a still more important difference is in this: that in all suits determined in the Circuit Courts under the Tucker Act, judgments bear interest from their date at the rate of four per cent. per annum, while judgments rendered by the Court of Claims

bear no interest whatever, unless in the exceptional case when they are appealed from that court and the judgment of that court is affirmed by the Supreme Court of the United States.

Repeals by implication are not favored under the law and are never allowed except in cases where inconsistency and repugnancy are plain and unavoidable. Certainly not where the intent of the legislature was to enlarge the jurisdiction rather than wipe out the existing one.

We submit that the court below did not err in this judgment and the same should be affirmed.

JOHN C. FAY,
Attorney for Appellee.